STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 21, 2006
V	No. 260903 Kent Circuit Court
MELVIN WILLIAM SPENCER, Defendant-Appellant.	LC No. 04-004523-FC

Before: Sawyer, P.J., and Fitzgerald and O'Connell, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of armed robbery, MCL 750.529, and sentenced as an habitual offender, third offense, MCL 769.11, to a prison term of 27 to 60 years.[1] He appeals as of right. We affirm.

I. Underlying Facts

Cornelius Williams testified that, on December 14, 2003, defendant and Hannah Gilliam came to his apartment. Defendant allegedly said that he was going to Lamont Bynum's house to buy a bag of marijuana, and "probably go get some drugs or something, rob him[.]" Williams understood their conversation to mean that a robbery was going to be committed. Williams testified that he was designated as the driver, and drove defendant and Gilliam to the location, dropped them off, and waited.

Bynum, Shaneka Birge's boyfriend, testified that, on the afternoon of December 14, 2003, defendant and a female knocked on Birge's door under the pretext of soliciting signatures for a petition. Bynum directed the individuals to the side door. The victims testified that, when they met the individuals at the door, defendant pulled Birge into the garage. Birge testified that she eventually escaped and went for help. Bynum testified that he heard a scuffle, and then saw defendant coming through the door with a gun. When Bynum went toward defendant, defendant

[1] Defendant was originally charged with assault with intent to commit murder, MCL 750.83, armed robbery, and possession of a firearm during the commission of a felony, MCL 750.227b. At his first trial, he was acquitted of assault with intent to commit murder, convicted of felony-firearm, and the jury could not reach a verdict on the armed robbery charge. Defendant was thereafter retried on the armed robbery charge.

shot him in the abdomen. After Bynum fell to the floor, defendant asked, "Where is your money?" Bynum denied having any money, and defendant went through Bynum's pockets and took about $40. Defendant continued to ask Bynum for money, as the female searched the house. Bynum indicated that an additional $600 was stolen. The two individuals fled, and Birge saw them get into a car. Williams testified that, after defendant got in his car, he saw a gun in defendant's pocket. He also indicated that defendant said that he "popped the dude," "shot the guy," and that they had obtained money and drugs. After arriving at Williams's apartment, defendant gave Williams $100 and left.

When the police responded to the scene, they found 14 pounds of marijuana in Birge's house. Both Birge and Bynum were ultimately charged with drug-related offenses. Neither Birge nor Bynum initially identified defendant. Throughout the proceedings, Birge maintained that she could not identify the perpetrators. Bynum admitted that he initially gave an incorrect identification, although he could identify defendant, because he planned to handle the matter, and was concerned about his family if he revealed defendant's identity. He admitted that he committed perjury during defendant's first trial by not identifying defendant. Bynum indicated that, after family discussions, he decided to cooperate and denied that his cooperation was related to his pending drug charge. At trial, Bynum identified defendant as the person who robbed and shot him.

II. Coerced Verdict

Defendant first argues that the trial court forced the jurors into rendering a verdict when it gave a deadlocked jury instruction that substantially departed from the standard jury instruction, CJI2d 3.12. We decline to review defendant's challenge to the jury instructions because the record reflects defense counsel's on-the-record expression of satisfaction with the trial court's instructions. Defendant's affirmative approval of the instructions waived any error. *People v Carter*, 462 Mich 206, 214-216; 612 NW2d 144 (2000).

We reject defendant's related argument that he was denied the effective assistance of counsel because defense counsel failed to object to the trial court's deadlocked jury instruction. Because defendant failed to raise this issue in the trial court in connection with a motion for a new trial or an evidentiary hearing, this Court's review is limited to mistakes apparent on the record. *People v Ginther*, 390 Mich 436, 443; 212 NW2d 922 (1973); *People v Sabin (On Second Remand)*, 242 Mich App 656, 658-659; 620 NW2d 19 (2000).

Effective assistance of counsel is presumed, and the defendant bears a heavy burden of proving otherwise. *People v Pickens*, 446 Mich 298, 302-303; 521 NW2d 797 (1994); *People v Effinger*, 212 Mich App 67, 69; 536 NW2d 809 (1995). To establish ineffective assistance of counsel, a defendant must show that counsel's performance was below an objective standard of reasonableness under prevailing norms and that the representation so prejudiced the defendant that there is a reasonable probability that, but for counsel's error, the result of the proceedings would have been different. *Id.*

"Claims of coerced verdicts are reviewed on a case-by-case basis, and all of the facts and circumstances, as well as the particular language used by the trial judge, must be considered." *People v Malone*, 180 Mich App 347, 352; 447 NW2d 157 (1989). Whether a trial court improperly foreclosed jurors from not reaching a verdict depends on the coercive nature of the

instructions given. *People v Pollick*, 448 Mich 376, 384; 531 NW2d 159 (1995). Likewise, "[w]hether any deviation from ABA standard [deadlocked jury instruction][2] is substantial in the sense that reversal is required depends on whether the deviation renders the instruction unfair because it might have been unduly coercive." *People v Hardin*, 421 Mich 296, 316; 365 NW2d 101 (1984). The instructions must not have caused a juror to abandon his or her conscientious opinion and defer to the decision of the majority solely for the sake of reaching a unanimous verdict. *Id*. at 314. "Where additional language contains 'no pressure, threats, embarrassing assertions, or other wording that would cause this Court to feel that it constituted coercion,' . . . that additional language rarely would constitute a substantial departure." *Id*. at 315, quoting *People v Holmes*, 132 Mich App 730, 749; 349 NW2d 230 (1984). Another relevant factor in determining if an instruction was coercive "is whether the trial court required, or threatened to require, the jury to deliberate for an unreasonable length of time or for unreasonable intervals." *Hardin, supra* at 316.

After the jury reported that it was unable to reach a verdict,[3] the trial court instructed the jury as follows:

> Okay, Ladies and Gentlemen, there is . . . an instruction in such a situation. Okay? And I'm going to give it to you. It's called a deadlock jury instruction. *I want you to listen to it, and I want you to also understand, it's already come out in this case, this case has been tried before. If you don't return a verdict, one way or the other, whether it's that the government hasn't proven their case or the government has proved their case, the case will be tried again in all likelihood. There are going to be 12 more people. They're not going to be any smarter. They're not going to be any less smart than you. We're asking you to return a verdict.*
>
> The deadlock jury instruction is as follows: You've returned from deliberations indicating that you believe you cannot reach a verdict. I'm going to ask you to please return to the jury room and resume your deliberations in the hope that after further discussion you will be able to reach a verdict.
>
> As you deliberate, please keep in mind the guidelines I gave you earlier. Remember, it is your duty to consult with your fellow jurors to try to reach agreement if you can do so without violating your own judgment. To return a verdict, you must all agree, and the verdict must represent the judgment of each of you.

---

[2] The ABA's model instruction, as adapted for a deadlocked jury, is incorporated in CJI2d 3.12.

[3] The jury sent a note on the second day of deliberations. On the first day, the jury deliberated from 12:30 p.m. until approximately 5:00 p.m. On the second day, the jury began deliberations at 8:30 a.m., took a 15-minute break, and deliberated until 11:30 a.m. The jury then took a 30-minute break, and resumed deliberating until 12:50 p.m., at which time they sent a note to the court.

> As you deliberate, you should carefully and seriously consider the views of your fellow jurors, talk things over in a spirit of fairness and frankness. Naturally, there will be differences of opinion. You should each not only express your opinion, but the reasons, and you should also give the facts and the reasons on which you base it. By reasoning the matter out jurors can often reach an agreement.
>
> When you continue your deliberations, you should not hesitate to rethink your own views and change your opinion if you decide it was wrong. However, none of you should give up your honest beliefs about the weight or effect of the evidence only because of what your fellow jurors think or only for the sake of reaching agreement. Okay?
>
> *With that instruction, I'm going to ask you to go back and give it another effort. I know you're trying hard, I really do. Okay? This is not easy. This is why they call it duty. It is a duty. It is a duty as a citizen in a free republic to sit in judgment, and that's what I'm asking you to do, please.* [Emphasis added.]

Viewed in their entirety, the trial court's instructions were not a substantial departure from the standard deadlocked instruction, nor were they coercive. Although the Michigan Criminal Jury Instructions do not have the official sanction of the Michigan Supreme Court, *People v Petrella*, 424 Mich 221, 277; 380 NW2d 11 (1985), they are useful in evaluating the propriety of the instructions given. In order to avoid the possibility of reversal, trial courts are directed to give the standard instruction, CJI2d 3.12, to deadlocked juries. See *Pollick*, *supra* at 382 n 12; *People v Larry*, 162 Mich App 142, 149; 412 NW2d 674 (1987).

Here, the central four paragraphs of the trial court's instructions were virtually identical to CJI2d 3.12. Although the trial court added some additional language, the instructions given properly reflected the applicable law, including that the jury's verdict must be unanimous, and that each juror should vote their conscience and not give up their honest opinions for the sake of reaching a unanimous verdict. The additional language contained no pressure, threats, embarrassing assertions, or other wording that would constitute coercion, and the trial court did not require, or threaten to require, the jury to deliberate for an unreasonable length of time or at unreasonable intervals.[4] Rather, even with the additional language, the "overall impact of the instruction given in this case was not to coerce the jury, but to stress the need to engage in full-fledged deliberations while maintaining the integrity of the judicial system." *People v Bookout*, 111 Mich App 399, 404; 314 NW2d 637 (1981). Because the challenged instructions were not

[4] We are not persuaded by defendant's claim that the instructions must be considered coercive because deliberations extended beyond 5:00 p.m., until 8:00 p.m., when the jury reached a verdict. The record does not disclose the circumstances of the schedule for deliberations. It is possible that the jurors preferred to continue deliberating because they were making progress. Without any indication in the record that the jurors were required to continue deliberating into the evening hours until they reached a verdict, or that they were denied the opportunity to be released and resume deliberations the following business day, we will not presume that their verdict was the result of coercion solely from the fact that it was rendered shortly after 8:00 p.m. "Defendant may not leave it to this Court to search for a factual basis to sustain or reject his position." *People v Traylor*, 245 Mich App 460, 464; 628 NW2d 120 (2001) (citation omitted).

unduly coercive and adequately protected defendant's rights, defense counsel was not ineffective for failing to object. See *People v Snider*, 239 Mich App 393, 425; 608 NW2d 502 (2000) (counsel is not required to advocate a meritless position).

III. Prosecutorial Misconduct

Defendant also argues that he was denied a fair trial because the prosecutor improperly vouched for Lamont Bynum's credibility by referencing the truthfulness requirements of a plea agreement. We disagree.

Because defendant failed to object to the prosecutor's conduct, we review this claim for plain error affecting substantial rights. *People v Carines*, 460 Mich 750, 752-753, 763-764; 597 NW2d 130 (1999). "No error requiring reversal will be found if the prejudicial effect of the prosecutor's conduct could have been cured by a timely instruction." *People v Schutte*, 240 Mich App 713, 721; 613 NW2d 370 (2000), abrogated in part on other grounds in *Crawford v Washington*, 541 US 36; 124 S Ct 1354; 158 L Ed 2d 177 (2004).

After defendant's first trial, at which Bynum testified that he could not identify defendant, Bynum was arrested for a drug offense related to the drugs found in Birge's residence. During defendant's second trial, in response to the prosecutor's questions during direct-examination, Bynum indicated that he was in court to "testify truthfully about what happened." Bynum indicated that, in exchange for an agreement to testify truthfully, he would not be charged with perjury for his false testimony at defendant's first trial, and nothing that Bynum said during defendant's second trial would affect Bynum's drug case. During closing argument, the prosecutor argued that Bynum was credible, and indicated that he was "honest with you about . . . deliberately trying to mislead the investigation about who had done it."

A prosecutor may not vouch for the credibility of a witness by conveying that she has some special knowledge that the witness is testifying truthfully, or express her personal opinion about the defendant's guilt. *People v Bahoda*, 448 Mich 261, 266-267; 531 NW2d 659 (1995); *People v Knapp*, 244 Mich App 361, 382; 624 NW2d 227 (2001). But the mere disclosure of a plea agreement with a prosecution witness, which includes a provision for truthful testimony, does not constitute improper vouching or bolstering by the prosecutor, provided she does not suggest special knowledge of truthfulness not available to the jury. *Bahoda*, *supra*; *People v Enos*, 168 Mich App 490, 492; 425 NW2d 104 (1988).

Defendant has failed to demonstrate plain error. When questioning Bynum on direct examination regarding the scope of the plea agreement under which he testified, the prosecutor did not state or imply that she had some special knowledge regarding the truthfulness of Bynum's testimony. Rather, the prosecutor merely recounted the details of the witness's plea agreement, and his former testimony. This was not improper. *Id*. We disagree with defendant's assumption that the jury likely found Bynum more credible based on the prosecutor's references to the plea agreement and his testifying "truthfully." If anything, the jury's knowledge of the plea agreement and Bynum's previous false testimony benefited defendant by tending to undermine Bynum's credibility.

Furthermore, viewed in context, the prosecutor did not improperly vouch for Bynum's credibility during closing argument, but rather permissibly advanced her theory that the evidence

supported a finding that Bynum's testimony was believable. She asserted that, although Bynum had testified untruthfully in the past, there were reasons to conclude that his present testimony was credible, such as his admission that he had previously been untruthful and his explanation why. The prosecutor's argument was not improper. A prosecutor may argue from the facts that a witness is credible. *People v Launsburry*, 217 Mich App 358, 361; 551 NW2d 460 (1996); *People v Fisher*, 220 Mich App 133, 156; 559 NW2d 318 (1996). Additionally, the trial court instructed the jurors that they were the sole judges of the witnesses' credibility and that the lawyers' comments are not evidence. The instructions were sufficient to dispel any possible prejudice. *People v Long*, 246 Mich App 582, 588; 633 NW2d 843 (2001).

IV. Coerced Testimony

We reject defendant's claim that the prosecutor impermissibly coerced Bynum into testifying "with the drug charge and a potential perjury charge if he didn't identify Defendant Spencer at the second trial." Because defendant failed to raise this issue below, we review this unpreserved claim for plain error affecting substantial rights. *Carines, supra*.

It is well settled that a prosecutor may not intimidate witnesses in or out of court. *People v Clark*, 172 Mich App 407, 409; 432 NW2d 726 (1988). But here, the sequence of events cannot reasonably be construed as an attempt by the prosecution to coerce Bynum into testifying against defendant. There is no indication that the prosecutor threatened to bring criminal drug charges that Bynum was not already facing. Furthermore, a prosecutor may inform a witness that false testimony could result in a perjury charge. See *People v Morrow*, 214 Mich App 158, 165 n 5; 542 NW2d 324 (1995), and *People v Robbins*, 131 Mich App 429, 439; 346 NW2d 333 (1984). Indeed, the "intimidation" alluded to by defendant was the prosecutor informing Bynum of the possibility that he could be charged with perjury if he did not testify truthfully, which does not amount to coercion. *Id.* Additionally, the circumstances of the purported intimidation, i.e., the plea agreement, as well as Bynum's purported reasons for testifying as he did in both trials, were brought out at trial. Simply put, there is nothing to suggest that Bynum's decision to testify was the result of improper intimidation.

V. *Blakely v Washington*

Defendant argues that he must be resentenced because the trial court's factual findings supporting its scoring of the sentencing guidelines offense variables 3, 9, 13, and 14, were not determined by a jury, contrary to *Blakely v Washington*, 542 US 296; 124 S Ct 2531; 159 L Ed 2d 403 (2004). We disagree. In *Blakely*, the United States Supreme Court struck down as violative of the Sixth Amendment a determinate sentencing scheme in which the sentencing judge was allowed to increase the defendant's maximum sentence on the basis of facts that were not reflected in the jury's verdict or admitted by the defendant. Our Supreme Court has determined that *Blakely* does not apply to Michigan's indeterminate sentencing scheme. *People v Drohan*, 475 Mich 140; 715 NW2d 778 (2006); *People v Claypool*, 470 Mich 715, 730 n 14; 684 NW2d 278 (2004).

VI. Ineffective Assistance of Counsel

We reject defendant's remaining claims that defense counsel was ineffective for failing to object to the unpreserved claims of errors discussed in parts III – V. In light of our conclusion

that these matters did not affect defendant's substantial rights, defendant cannot demonstrate that there is a reasonable probability that, but for counsel's inaction, the result of the proceeding would have been different. *Effinger*, *supra*.

Affirmed.

/s/ David H. Sawyer
/s/ E. Thomas Fitzgerald
/s/ Peter D. O'Connell